

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of)
ARM 12.14.101, 12.14.105, 12.14.115,)
12.14.120, 12.14.125, 12.14.135,) NOTICE OF PUBLIC HEARING ON
12.14.140, 12.14.150, 12.14.160 and) PROPOSED AMENDMENT
12.14.165 regarding commercial use)
rules in Montana)

TO: All Concerned Persons

1. On September 16, 2009 at 6:00 p.m. the Fish, Wildlife and Parks Commission (commission) will hold a public hearing at the Red Lion Colonial Inn, 2301 Colonial Drive, Helena, Montana to consider the proposed amendment of the above-stated rules.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, please contact the commission no later than September 8, 2009, to advise us of the nature of the accommodation that you need. Please contact Stella Cureton, Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; fax (406) 444-7456; e-mail scureton@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

12.14.101 DEFINITIONS (1) and (2) remain the same.

(3) "Commercial use" means any person or entity that utilizes land under the control, administration, and jurisdiction of the Montana Department of Fish, Wildlife and Parks for consideration. Commercial use includes any person, group, or organization, that makes or attempts to make a profit, vend a service or product, receive money, amortize equipment, or obtain goods or services as compensation from participants in activities occurring on land that is under the control, administration, and jurisdiction of the department. This includes nonprofit organizations and educational groups that receive money from participants in activities occurring on department land. This includes a person whose business operates on department land, regardless of that person's physical presence at the site, but does not include a person who rents, sells, or otherwise provides equipment or merchandise that is used on department land unless the renting, selling, delivering, or providing of equipment or merchandise takes place on department land. Examples of commercial use that are governed by these rules include but are not limited to: trail rides, guided walks or tours, float trips, guided angling or hunting, game retrieval, professional dog training, equipment rentals, retail sales, food concessions, filming, firewood cutting, construction-related activities, research when accompanied by paying clients, or any combination thereof.

(4) through (9) remain the same.

(10) "Guide" means a person who is employed by or who has contracted independently with a licensed outfitter and who accompanies a participant during outdoor recreational activities that are directly related to activities for which the outfitter is licensed.

~~(10)~~(11) "Mitigation" means an enforceable measure, within the authority of the agency or mutually agreed to by the permit holder that is designed to reduce or prevent undesirable effects or impacts of the proposed use.

(12) "Nonprofit organization" means an organization that does not distribute its surplus funds to owners or shareholders and exists solely to provide programs and services that are of public benefit. While they are able to earn a profit, more accurately called a surplus, such earnings must be retained by the organization for its future provision of programs and services. Earnings may not benefit individuals or stake-holders. Examples include charities and service organizations.

(13) "Outfitter" means any person, except a person providing services on real property that the person owns for the primary pursuit of bona fide agricultural interests, who for consideration provides any saddle or pack animal; facilities; camping equipment; vehicle, watercraft, or other conveyance; or personal service for any person to hunt, trap, capture, take, kill, or pursue any game, including fish, and who accompanies that person, either part or all of the way, on an expedition for any of these purposes or supervises a licensed guide or professional guide in accompanying that person.

(11) through (14) remain the same, but are renumbered (14) through (17).

~~(15)~~(18) "Water-based service provider outfitter or guide" means any person who for consideration provides any facilities; camping equipment; vehicle, watercraft, or other conveyance; or personal service for any person to float or otherwise recreate on the water in the absence of hunting or angling, and who accompanies that person, either part or all of the way, on an expedition for any of these purposes or supervises a person in accompanying that person water-related recreation services or supervises someone providing these services. This includes outfitters and guides that are licensed by the state of Montana, and water-based service providers that are not licensed by the state of Montana.

(16) remains the same, but is renumbered (19).

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA

IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing to add the word "delivering" to the definition of commercial use to further clarify that the rules apply to businesses that deliver watercraft or other types of equipment to department land. To be consistent with the Montana Board of Outfitters, the commission is proposing definitions for outfitter and guide. The commission is proposing amending water-based outfitter and guide to water-based service provider to distinguish between a licensed outfitter or guide and a nonlicensed water-based service provider. The commission is proposing adoption of a definition for nonprofit organization to clarify which organizations qualify.

12.14.105 APPLICABILITY OF COMMERCIAL USE RULES (1) and (2) remain the same.

(3) Noncompliance with the commercial use rules constitutes a violation of commission rules and regulations and as such may be punishable by citation and suspension or revocation of commercial use privileges at department sites.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing additional language clarifying that the department may issue citations and suspend or revoke a commercial use permit for violating the commercial use rules.

12.14.115 GENERAL POLICY (1) and (2) remain the same.

(3) Commercial use on department land is a privilege, not a right. Authorization to conduct commercial use may be denied, amended, suspended, or revoked at any time for cause. Historical commercial use of a site does not convey a right to conduct commercial use in the future. If it becomes necessary to ration and allocate commercial use, the department is not required to allocate opportunities based on historical use of a site.

(4) through (9) remain the same.

(10) Commercial hunting outfitting is prohibited on all department land and on water bodies that are located entirely within the boundaries of department land. Commercial fishing outfitting is prohibited on all wildlife management areas. The department may authorize commercial use that is solely for the purpose of assisting the public in the retrieval of legally harvested game animals. The department may authorize a commercial hunting outfitter to:

(a) travel on a designated trail across department land solely for the purpose of gaining access to ~~federal~~ publicly owned land where the commercial hunting outfitter is authorized to conduct use; and

(b) use a fishing access site solely for the purpose of gaining access to water bodies where the commercial hunting outfitter is authorized to conduct use.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing to add an intermediate disciplinary action of suspending commercial use as provided in ARM 12.14.120 and to change the department to authorize travel on a designated trail to gain access to publicly owned land in order to include publicly owned state land and not just federal land.

12.14.120 COMMERCIAL USE PERMITS (1) through (4)(h) remain the same.

(5) The availability, terms, and conditions of a commercial use permit may vary based on the regulations and management plan in place at the site where the use would occur. The department may issue a citation for failure to comply with the

terms of the permit. The department may refuse applications for a permit if the use would occur at a site where commercial use is rationed and there are no additional opportunities to conduct such use.

(6) through (12) remain the same.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA

IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing to amend ARM 12.14.120 to further clarify the department's authority to cite a commercial use permit holder for violating the terms of a permit. Permit terms enable the department to properly administer authorized commercial use.

12.14.125 FISHING ACCESS SITE PERMIT (1) An outfitter or water-based service provider must possess and have on their person a valid fishing access site permit when conducting commercial use ~~A fishing access site permit is required to conduct water-based outfitting at fishing access sites and other department land that provide access to a nonrestricted water body. , except an outfitter or water-based service provider with a valid restricted use permit for a restricted water body does not need a fishing access site permit to conduct commercial use at fishing access sites and other department land that provide access to that restricted water body.~~

(2) A guide or person conducting work for a water-based service provider must possess and have on their person a valid fishing access site permit ~~is required to conduct water-based guiding when conducting commercial use~~ at fishing access sites and other department land that provides access to water bodies.

(3) A fishing access site permit authorizes an ~~water-based~~ outfitter or water-based service provider to conduct commercial use ~~water-based outfitting~~ at any fishing access site or other department land in the state that provides access to a nonrestricted water body unless the department specifies that a restricted use permit is required for the site. An ~~water-based~~ outfitter or water-based service provider must obtain a restricted use permit to conduct water-based outfitting at a fishing access site or other department land that provides access to a restricted water body.

(4) A fishing access site permit authorizes a ~~water-based~~ guide, operating under the authority of an ~~water-based~~ outfitter, or a person conducting work for a water-based service provider, to conduct commercial use ~~water-based guiding~~ at any fishing access site or other department land for which the outfitter or water-based service provider is authorized to conduct use.

(5) A fishing access site permit is valid for the time period specified on the permit ~~an annual permit that is valid for the license year in which the permit is issued.~~

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA

IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing to amend ARM 12.14.125 to provide consistency with the proposed definitions of outfitter, guide, and water-based service provider in ARM 12.14.101. The commission is proposing

the language excepting an outfitter or water-based service provider with a valid restricted use permit for a restricted water body from needing a fishing access site permit for clarification that an outfitter or water-based service provider does not need two permits for a restricted water body. Also, the commission is proposing to authorize the department to issue permits for specific consecutive days to provide for a fishing access site permit that is less expensive than the annual version of the permit.

12.14.135 FISHING ACCESS SITE PERMITTING DECISIONS (1) remains the same.

(2) The regional park manager, in consultation with the regional supervisor, may deny, suspend, or revoke a fishing access site permit for failure to comply with the terms of the permit, violating ~~department~~ commission rules and regulations, or other infractions identified by the department. If a nonrestricted water body is reclassified as a restricted water body, a fishing access site permit is no longer valid at the sites that provide access to the restricted water body. The fishing access site permit holder may apply for a restricted use permit to use these sites.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing language to reflect the new department organizational structure and to add an intermediate disciplinary action of suspending commercial use as provided in ARM 12.14.120.

12.14.140 RESTRICTED USE PERMIT (1) A restricted use permit is required for the following:

(a) outfitter or water-based service provider conducting commercial use ~~outfitting~~ at a fishing access site or other department land that provides access to a restricted water body; and

(b) all other types of commercial use at a fishing access site, state park, wildlife management area, or department administrative site.

(2) through (5) remain the same.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing to amend ARM 12.14.140 to provide consistency with the proposed definitions of outfitter and water-based service provider in ARM 12.14.101.

12.14.150 RESTRICTED USE PERMITTING DECISIONS (1) through (1)(j) remain the same.

(2) The availability, terms, and conditions of a restricted use permit may vary based on the regulations and management plan in place at the site where the use would occur. ~~Prior to issuing a permit to conduct~~ Permitting decisions for commercial use at a wildlife management area must comply with a statewide plan for authorizing

and administering commercial use at wildlife management areas. ~~, the department must prepare a commercial use plan for that site. The statewide commercial use plan for wildlife management areas shall:~~

- ~~(a) identify the types of commercial use that may be authorized at the site;~~
- ~~(b) establish the general terms and, conditions, ~~and volume of commercial use that may be authorized; and~~~~
- ~~(c) establish the methods for allocating commercial use permits.~~
- ~~(3) through (6) remain the same.~~
- ~~(7) The regional park manager supervisor, in concurrence with the appropriate division administrator, shall be responsible for restricted use permitting decisions at state parks and fishing access sites. The regional supervisor shall be responsible for restricted use permitting decisions at wildlife management areas.~~
- ~~(8) and (9) remain the same.~~

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission proposes amendments that would direct the department to comply with a statewide commercial use plan when authorizing commercial use at a wildlife management area. A statewide plan, versus individual plans for each wildlife management area, would result in more consistent decision making across the state and require fewer resources.

12.14.160 COMMERCIAL USE FEES (1) remains the same.

(2) The department has discretionary authority to adjust a restricted use permit fee upward or downward to accommodate the nature of the activity, compensate for site impacts or department staffing needs, or for other unique circumstances pertaining to the permitted activity.

~~(2)(3)~~ The department may adjust ~~waive~~ commercial use fees on a case-by-case basis for educational groups when the following conditions are met:

- ~~(a)~~ the group is from a bona fide institution that meets the definition of an educational group;
- ~~(b)~~ the group provides a written explanation of the educational purpose of the visit; and
- ~~(c)~~ the use is not primarily for recreational purposes.

~~(3)(4)~~ The department may ~~waive or~~ adjust commercial use fees on a case-by-case basis when the commercial use permit holder:

(a) donates proceeds from the use or event ~~are donated to the management or improvement of fish, wildlife, and parks, including to the maintenance, management, or the improvement or development of facilities; or , at the site where the use occurs.~~

(4)(b) donates proceeds from the event or activity to a nonprofit organization or charitable cause ~~The department may waive or adjust commercial use fees when a service provider donates their services for a charitable cause and is not compensated for the service.~~

(5) The department may adjust commercial use fees on a case-by-case basis for special events involving children under the age of thirteen.

(6) The department may adjust commercial use fees on a case-by-case basis for commercial use when the sole purpose of the use is to promote department land and resources.

(5) remains the same but is renumbered (7).

(8) The department may charge a processing fee for recovery of costs associated with issuing a new restricted use permit when a business is sold or transferred.

(6) and (7) remain the same but are renumbered (9) and (10).

(11) The department may retain, amend, or replace an existing fee system.

(12) The department may require a minimum annual fee for administering permits or when authorizing commercial use in cooperation with another agency.

(13) The department may require a permit holder to pay a fee in advance that is an estimate of the actual amount that will be due by the date specified in the terms of the permit.

(14) The department may suspend or revoke a permit if the fee is not paid in full by the date specified in the terms of the permit.

AUTH: 2-4-102, 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA

IMP: 2-4-102, 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing amendments to provide the department flexibility to adjust a restricted use permit after considering the unique characteristics of a particular activity or event, provide greater latitude to adjust commercial use permit fees as deemed appropriate, and the ability to recover some of the administrative costs associated with the sale of a commercial business and the subsequent issuance of a permit. The language of the proposed amendments is currently located in the commercial use permit fee biennial rule.

12.14.165 RATIONING AND ALLOCATION OF COMMERCIAL USE (1) remains the same.

(2) The regional park manager or regional supervisor, ~~in concurrence with the appropriate division administrator, director, and the commission,~~ may recommend that the commission ration and allocate commercial use at a state park, wildlife management area, fishing access site that provides access to lakes, or department administrative site. The department regional supervisor may consider the following when making rationing and allocation ~~decisions~~ recommendations to the commission:

- (a) laws, rules, policies, management plans, and land use plans for the site;
- (b) overall mission, goals, and objectives of the site;
- (c) input from the public;
- (d) public safety concerns;
- (e) biological conditions;
- (f) social conditions;
- (g) use conflicts;
- (h) past performance of commercial users;
- (i) public demand for commercial use; and
- (j) other factors as determined by the department.

(3) The ~~regional supervisor~~ department shall describe what actions have already been taken by the department to address a particular problem or concern, why rationing is necessary, and how rationing of use would address a particular problem or concern.

(4) remains the same.

AUTH: 23-1-105, 23-1-106, 87-1-301, 87-1-303, MCA
IMP: 23-1-105, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: The commission is proposing amendments to reflect the department's new organizational structure and clarify the commission's authority to ration and allocate use. The department's role is limited to making a recommendation.

4. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Charlie Sperry, Fish, Wildlife and Parks, 1420 East 6th Avenue, P.O. Box 200701, Helena, MT 59624-0701; fax (406) 444-4952; e-mail commercialcomments@mt.gov, and must be received no later than September 28, 2009.

5. Charlie Sperry, or another hearing officer appointed by the department, has been designated to preside over and conduct the hearing.

6. The Department of Fish, Wildlife and Parks maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the commission or department. Persons who wish to have their name added to the list shall make written request which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the commission or department.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ Bob Ream
Bob Ream, Acting Chairman
Fish, Wildlife and Parks Commission

/s/ Rebecca Jakes Dockter
Rebecca Jakes Dockter
Rule Reviewer

Certified to the Secretary of State August 17, 2009